SUPREME COURT, U. S. IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1031

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MARVIN J. MORSE,
Petitioner,

vs.

D. A. HINDMAN, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF FOR RESPONDENTS TOMLINSON-KATHOL, INC.; WILLIAM T. KEMPER; RAY H. QUACKENBUSH; EUGENE CRABTREE; FRANK E. HEDRICK; THEODORE CARTER; JIM DONHAM; E. DAVIS HICKMAN; JESSIE I. WILCOXON; THE FOURTH NATIONAL BANK AND TRUST COMPANY, WICHITA; WARREN TOMLINSON, GERALD J. KATHOL; OREAD OIL COMPANY; CHARLES AIKENS; JOE HICKMAN; JAMES W. OWENS, RUSSELL COBB, JR.; BARTON OIL COMPANY AND LYDIA E. KEARNS IN OPPOSITION

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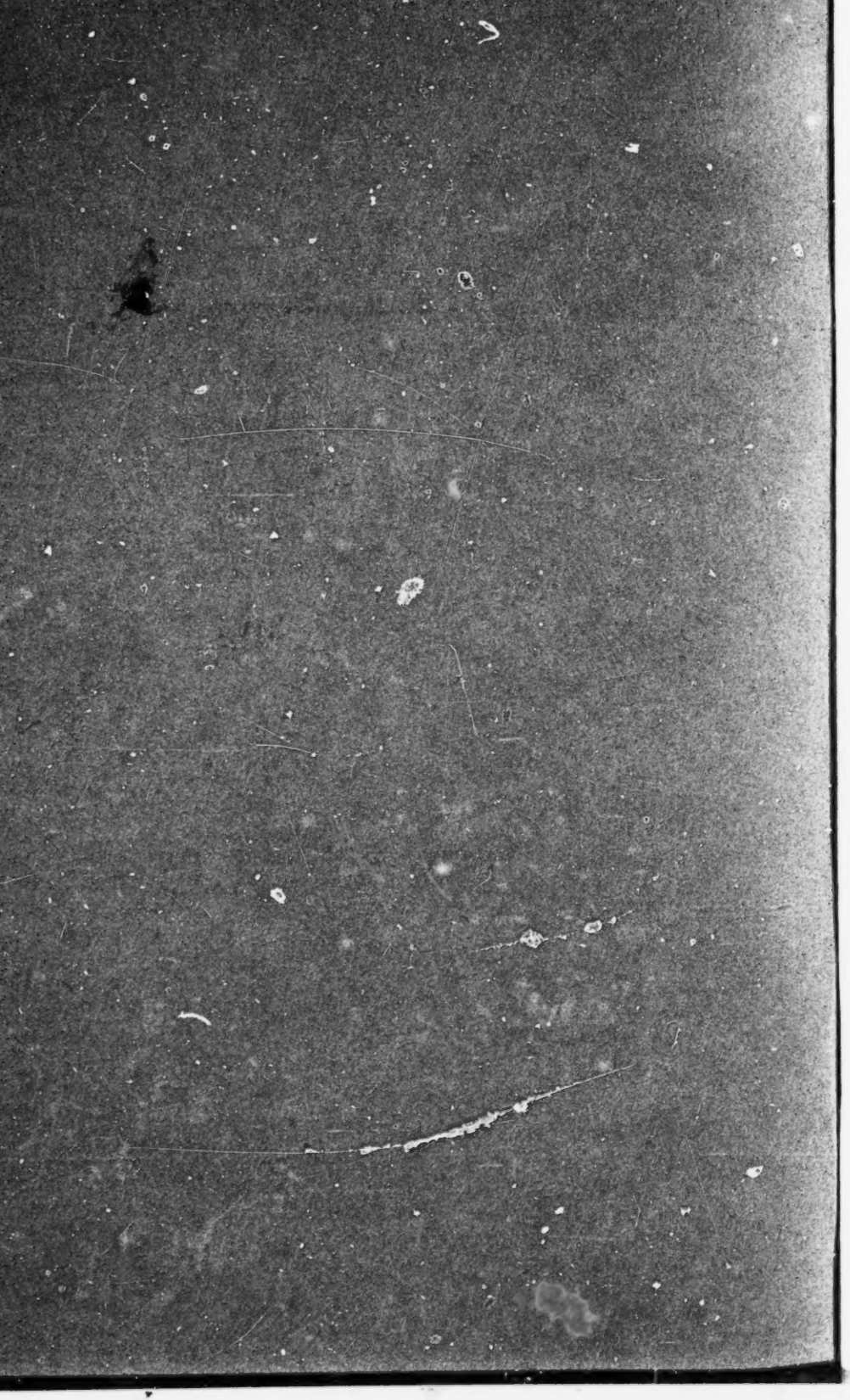

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OPINIONS BELOW

The various opinions below are set forth in the Appendix to the Petition on pages 21 through 29.

JURISDICTION

Jurisdictional requisites are set forth in the Petition.

QUESTIONS PRESENTED

1. Whether this Court should grant a writ of certiorari to review the stay order and order denying summary judgment entered by the United States District Court for the District of Kansas when both orders are the subject of pending appeals by petitioner to the United States Court of Appeals for the Tenth Circuit.

2. Whether this Court should grant a writ of certiorari to review the actions of the Kansas courts when an undecided appeal taken by petitioner raising substantially the same issues is now pending in the Supreme Court of the State of Kansas.

3. Whether this Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit refusing to issue a writ of prohibition or an injunction to stay the state court proceedings.

4. Whether the Kansas courts or the federal courts have jurisdiction over the real property involved where the state court action was brought between the time when the federal district court entered an order sustaining a motion to dismiss a class action as improperly brought and the date an amended complaint was filed in the federal district court in the name of individual plaintiffs pursuant to leave of the federal district court judge.

5. Whether under Kansas law the failure to join a deceased minor and two children of living defendants who had no record title makes any judgment rendered in a quiet title action void.

STATEMENT OF THE CASE

The original action that commenced this series of litigation was a "petition" filed in the United States District Court for the District of Kansas (R. 7) on March 3, 1966. As stated by petitioner herein on page 17 of the Petition*, the plaintiffs claimed that a judgment taken against them and their predecessors in interest to a tract of real property located in Rooks County, Kansas, was void because of failure to join indispensable parties defendant and because of fraud in procuring the judgment.

These respondents (who are the oil and gas lessee and its grantees), together with the owners of most of the mineral interest in the property, were joined as defendants. Plaintiffs sought to recover possession of the property, damages and an accounting.

Such action was originally filed as a class action by two sisters on behalf of a class purporting to consist of eight sisters. Defendants moved to dismiss the purported class action on the basis that the filing of a class action on behalf of so small a "class" was impermissible and was merely a device to circumvent the diversity requirements for federal court actions inasmuch as other sisters were Kansas residents.

On October 21, 1966, the Honorable George Templar entered his "Ruling on Special Issue of Class Action". (P. Appendix A; R. 41.) In this ruling, which respondents contend amounted to a dismissal of the action, Judge Templar found that the action was not a proper class action and then granted the individual plaintiffs ten days to file an amended complaint in their own behalf.

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*Reference to the Petition in this Brief will be denoted by "P. . . ." and reference to the Record will be denoted by "R. . . ."

On October 28, 1966, defendants Hindman and Lynd (the mineral owners from whom these respondents obtained their interests in the property in question) instituted an action in the District Court of Rooks County, Kansas, against all of the present claimants to the property. (R. 1,047.) These respondents are not a party to that action.

Thereafter, on November 1, 1966, an amended complaint was filed in the United States District Court for the District of Kansas by Mary Catherine Shepard, mother of petitioner herein, and by Margaret Christensen.

In conjunction with numerous motions in both courts in which petitioner and the other claimants to the property sought to have the state court action dismissed or stayed, the defendants filed answers in the state court action (R. 1,055, 1,058) in which they asserted by way of counterclaim substantially all of their claims to the property that they make in the federal court action.

The state court action was then tried to the court sitting without a jury, and on September 3, 1968, the Honorable C. E. Birney, entered judgment* against petitioner and the other claimant-defendants and quieted title (except for an undisputed 3/8 mineral interest) in favor of plaintiffs Hindman and Lynd against the claims of defendants Morse and the other claimants. After a motion for new trial was overruled on October 14, 1968 (R. 1,097), petitioner filed a notice of appeal to the Supreme Court of the State of Kansas. (R. 1,098.) Other defendants in that action had previously filed notices of appeal. (R. 1,090, 1,091, 1,094 and 1,095.)

*Judge Birney's Opinion and Findings of Fact and Conclusions of Law are set forth in full in the Appendix attached hereto. The Findings of Fact contained therein contain a good resume of the operative facts upon which this action was based.

The day after the judgment in the state court action was entered, defendants Hindman and Lynd filed a motion in the federal court action to stay all further proceedings in the federal court action pending the state court judgment becoming final by appeal or otherwise. The motion to stay, in which these respondents joined, was granted by Judge Templar on October 11, 1968. (P. 15; R. 237.) Petitioner filed a notice of appeal from the stay order and from several prior orders on October 25, 1968. (R. 242.) Motions to dismiss the attempted appeal have been filed but not decided.

Thereafter, on November 12, 1968, the United States Court of Appeals for the Tenth Circuit refused an original application of petitioner for a writ of prohibition or an injunction staying the proceedings in the Kansas courts. (P. 30.)

To briefly summarize the proceedings below, the state court action has been tried and is now on appeal. The Kansas Supreme Court refused to grant petitioner's highly unusual motion to dismiss the action without hearing (P. 29), so his appeal is still pending in that court. The federal court action has been stayed pending the outcome of the state court appeal, and petitioner herein has appealed that stay order. Undecided motions to dismiss that appeal are on file with the United States Court of Appeals for the Tenth Circuit. The Court of Appeals refused to short-cut the appeal process by granting a writ of prohibition or an injunction against the state court proceeding. There is, therefore, an undecided appeal now pending before both the Supreme Court of the State of Kansas and the Court of Appeals for the Tenth Circuit. Both the federal court and the state court actions involve the same issues relating to the ownership of the property in question.

REASONS FOR DENYING THE WRIT

1. There are pending appeals before the United States Court of Appeals for the Tenth Circuit and the Supreme Court of the State of Kansas in which all of the issues presented in this litigation may be determined.

2. This action is absolutely unique on its facts, involves no conflict in decisions by the various Circuit Courts of Appeals and presents no question of public importance.

3. Petitioner is not entitled to any relief on the merits.

ARGUMENT

I.

All of the Issues Presented by the Petitioner Are Either Before the United States Court of Appeals or the Supreme Court of the State of Kansas or May Yet Be Presented to Such Courts.

Although petitioner states in his petition that he ". . . has exhausted both Federal and State Court remedies . . ." (P. 19), the fact of the matter is otherwise. There has been no final judgment rendered by any appellate court on the merits of petitioner's lawsuit. His own appeal to the Supreme Court of the State of Kansas is still pending and that tribunal has not been afforded any opportunity to consider any of the substantive law questions relating to the validity of the 1944 quiet title judgment or any of the issues underlying petitioner's claim for relief. The order of the Supreme Court of the State of Kansas of which petitioner complains did not dispose of the case, but merely left the case for full argument on the merits.

Similarly, the United States District Court for the District of Kansas has rendered no final judgment. Judge

Templar has only stayed his action pending the outcome of the state court action. The Court of Appeals for the Tenth Circuit has not yet been afforded an opportunity to review that stay order.

Even if the motions to dismiss the appeal from the stay order and other preliminary orders is granted, however, this proceeding in this Court would still be premature. Judge Templar's order, being only interlocutory in nature, does not in any manner purport to dispose of the case, and after a final judgment is rendered by the district court, petitioner can then take an appropriate appeal if he is dissatisfied with the result.

Thus, all of the issues involved in this litigation are still pending in both judicial systems and rather than petitioner having exhausted his remedies in both judicial systems, he has not prosecuted his case completely through either judicial system. The petition is, therefore, premature and ". . . it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor and Aroostook Railroad Company*, 389 U.S. 327, 328, 88 S.Ct. 437, 19 L.Ed.2d 560, 561 (1967).

II.

The Case at Bar Involves a Unique Factual Situation of Concern Only to the Individual Litigants and Is of No Public Importance.

As is obvious from a review of the factual statement contained in both the Petition and in this Brief in Opposition, the basic litigation herein is concerned only with title to a particular tract of real property located in Rooks County, Kansas, and with the validity of a particular quiet title action that is now approximately twenty-five years old. The questions presented in this litigation are of considerable economic importance to the parties, and the

legal questions presented by reason of the tortured course of the various companion pieces of the litigation are somewhat complex, but neither of these is sufficient to warrant this Court granting the Petition. Rule 20 of this Court states that:

> "A writ of certiorari to review a case pending in a court of appeals before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court."

Clearly, there is nothing of "imperative public importance" in the case at bar such as this Court had before it in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153, 26 A.L.R.2d 1378 (1952) where the President of the United States had ordered the seizure of the steel plants and facilities of the nation's steel companies and in *United States* v. *United Mine Workers of America,* 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947) where a federal district court had issued restraining orders preserving labor conditions at coal mines seized by the federal government during the time of war.

Similarly, a writ of certiorari should not be granted to review the state court proceedings as no federal question of substance has been decided at all in that system as required by Rule 19 of this Court. As stated by the late Mr. Justice Frankfurter in *Rice* v. *Sioux City Memorial Park Cemetery,* 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955):

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. (citations

omitted.) 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. * * *"

(349 U.S. at 74, 99 L.Ed. at 901.)

The only question that has been decided by the Supreme Court of Kansas is that it will not dismiss the state court proceedings during the middle of an unargued and unbriefed appeal on the basics of a motion filed by one of the losing parties. Such a decision hardly creates any "federal question of substance."

As for the third judgment or order sought to be reviewed herein, the refusal of the Court of Appeals for the Tenth Circuit to issue the extraordinary writ of prohibition or to grant an injunction is not the type of decision this Court ought to review by certiorari. Rule 19 of this Court states that such review will only be had: where the decision is in conflict with the decision of another circuit court of appeals; where an important question of state law has been decided in conflict with the applicable state or territorial law; where an important question of federal law should be settled by this Court; where the circuit court has decided a question of federal law in conflict with a decision of this Court; or where the circuit court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power by supervision.

Of these various bases for review, the only possible one present in the instant case is the last. We submit, however, that the action of the court of appeals in refusing to interfere with the state court was entirely proper and in full accordance with the accepted and usual course of judicial proceedings.

This Court has upheld the use of stay orders pending the outcome of actions in another court. *Landis* v. *North American Company,* 299 U.S. 248, 57 S.Ct. 163, 81 L.Ed. 153 (1936). Among the decisions of the courts of appeals upholding the actions of federal district court judges in staying proceedings pending the outcome of state court actions are *Amdur* v. *Lizars,* 372 F.2d 103 (4th Cir. 1967); *Glen Oaks Utilities, Inc.* v. *City of Houston,* 280 F.2d 330 (5th Cir. 1960); *Ray* v. *Hasley,* 214 F.2d 366 (5th Cir. 1954); *Jewell* v. *Davies,* 192 F.2d 670 (6th Cir. 1951); *Mottolese* v. *Kaufman,* 176 F.2d 301 (2d Cir. 1949).

Thus, even if the petition before the Court were not premature, this is not the proper type of case for this Court to review. It presents no issues of public importance and involves no conflicting decisions between two courts of appeals, between state and federal courts, or between this Court and a court of appeals.

III.

The Kansas Courts Have Exclusive Jurisdiction over the Real Property Which Is the Subject Matter of This Action.

Even if the petition herein were not premature and even if this action were of sufficient public or judicial importance to justify review by this Court, there has been no error committed by the lower federal courts.

Judge Templar was clearly correct in ruling that the attempted class action could not be maintained where there were only eight sisters in the class. Even petitioner makes no complaint of that ruling.

Although Judge Templar's written decision (R. 41) did not expressly state that the action was dismissed, it is the contention of the respondents that there can be no other reasonable construction of his ruling. In the first

place, the order was entered in determining a motion to dismiss filed by certain of the defendants.

In the second place, Judge Templar obviously considered the ruling to be a dismissal. He expressly granted the plaintiffs the right to file an amended complaint for themselves individually. If the action were not dismissed, there would have been no reason for such leave to file an amended complaint to have been requested or granted. Moreover, in the Order Granting Stay (R. 237), Judge Templar dismissed the rule of priority applicable to in rem actions and at least implied that the state court action was entitled to priority because of having been commenced before the amended complaint was filed in the federal court case. Judge Templar thus seems to have twice construed his own order to be a dismissal.

IV.

Petitioner Is Not Entitled to Any Relief on the Merits.

Although we recognize that this Court does not want an extended discussion of the merits of actions in briefs in opposition, we will explain briefly why the Rooks County trial court correctly held against petitioner in the full trial there on the merits.

Briefly stated, petitioner's basic claim for relief is that the quiet title action which barred his claim to the real property in question was "void on its face" because of failure to join three indispensable parties. He also claims that the judgment was procured by fraud in that the mother of the defendants induced her daughters not to defend the action.

The three persons petitioner claims were indispensable parties to the action were James E. Atherton (the minor son of the life tenants, George and Hattie Atherton, who

conveyed their entire interest in the property to Hindman and Lynd), Mary Dunlap and Mary Hillman Casey. James E. Atherton died a minor and without issue in 1934 or about ten years before the conveyance and quiet title suit in question. Obviously, since his remainder interest, if any, would have passed by intestacy to his parents, he was not an indispensable party

Similarly, another of the alleged indispensable parties was Mary Dunlap who was the daughter of one of the defendants in the original quiet title action who was actually served with process. Mary Dunlap had no interest in the property as her father was still alive and still vested of record with whatever interest might have descended to him, so there was no reason for her to be joined.

Almost exactly the same situation obtains for the third of the so-called indispensable parties, Mary Hillman who is also known as Mary Casey. She was the daughter of Barbara Hillman who was also a named defendant in the 1944 quiet title action. Since any remainder interest would have passed to Barbara Hillman and since there was no conveyance or other document of record transferring her interest to her daughter Mary, there was no reason to join Mary as a party. Clearly, these two daughters of named defendants had no vested or contingent interest in the property and were not even proper parties to that 1944 action much less indispensable parties.

But even if those three persons were somehow indispensable, the failure to join them would not have made the judgment void as claimed by petitioner. A court that proceeds to try an action that has not had all indispensable parties joined is in error, but the failure to join indispensable parties does not deprive the court of the power to enter a binding judgment over the parties who are properly

joined. E.g., *Doerr* v. *Warner,* 76 N.W.2d 505 (Minn. 1956); *Dyer* v. *Stauffer,* 19 F.2d 922 (6th Cir. 1927), cert. denied 275 U.S. 551, 48 S.Ct. 114, 72 L.Ed.2d 421 (1927); *State of Washington* v. *United States,* 87 F.2d 421 (9th Cir. 1936); *Shields* v. *Barrow,* 17 How. 130, 141, 15 L.Ed. 158 (1855); 2 *Barron & Holtzoff,* Federal Practice and Procedure, § 516, p. 163; and 3A *Moore's Federal Practice,* Par. 19.07-2 [O] p. 2258. Cf., *Bogart* v. *Southern Pac. Co.,* 228 U.S. 137, 146, 33 S.Ct. 497, 57 L.Ed. 768 (1913).

As for the claim of petitioner that Hattie Atherton fraudulently tricked her children into not defending the 1944 quiet title action, the district judge of the Rooks County district court who heard the evidence on that point said:

> "The Court finds that each of the eight daughters of George and Hattie Atherton (including Mary Catherine Sheperd, deceased) had actual knowledge of the transaction entered into by their parents with the plaintiff Lynd. They also knew that as a part of that transaction a quiet title suit was commenced and prosecuted in which they were joined and summoned as defendants. The Court also finds that the eight daughters failed to appear and plead or assert any title to the property in the quiet title action and that they did so knowingly and intentionally. None of the defendants acted upon any advice or statement of the plaintiffs. None of the eight children were under any disability which would have prevented them from asserting any claims or rights which they might have had or believed they had at the time of the quiet title suit. The defendants and cross-petitioners in this action have failed to sustain the burden of showing that they were misled, defrauded or overreached by anyone in connection with their failure to appear and litigate the 1944 quiet title action."
>
> "* * * There is no creditable evidence adduced by the defendants and cross-petitioners in this action tending to establish that George Atherton or Hattie Atherton

were acting as the agents or as conspirators with either of the plaintiffs in connection with any statements made by the parents to their children concerning the Lynd transaction or the quiet title suit. The evidence adduced by all of the parties convinces the Court that Lynd and Hindman were at all times acting in good faith. The Court also believes that at the time of the tax foreclosure, the transaction with Lynd and the quiet title action, George Atherton and his wife were acting in good faith and pursued the course which they believed to be the most reasonable and best one available to them to salvage some interest in the land for themselves and for their children."

(R. 1077-1078. Our Appendix, pp. A7, A8.)

As the learned Kansas district court judge correctly observed, the transaction in which George and Hattie Atherton saved their home from sale at tax foreclosure was entered into in good faith by all parties and with the full knowledge and approval of the eight daughters including petitioner's mother. There was nothing wrongful or fraudulent about any part of the transaction. Years later, after oil production was obtained on the property, the daughters and some of their children apparently have changed their minds and now wish they had found some other way for their parents to keep from losing the family farm for nonpayment of taxes. It is too late for such second thoughts, however, and petitioner and his relatives have no basis for their varicus actions.

CONCLUSION

All of the substantive issues involved herein are still pending before the Supreme Court of the State of Kansas as well as before both the United States District Court for the District of Kansas and the United States Court of Appeals for the Tenth Circuit, and none of such issues is of

sufficient importance to merit review by this Court. Moreover, petitioner's underlying claims for relief are most tenuous and entirely lacking in merit. It is, therefore, respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE DISTRICT COURT OF ROOKS COUNTY, KANSAS

D. A. HINDMAN and CHARLEY A. LYND,
Plaintiffs,
vs.
MARY CATHERINE SHEPARD, ET AL.,
Defendants.
No. 9873

MEMORANDUM OPINION

This is a quiet title suit. To the petition certain of the defendants filed answers and cross petitions. The cross petitions primarily allege ownership in the property and fraud on the part of the plaintiffs.

A pretrial was held in which all of the questions of fact and of law were fully and ably presented to the Court. A question of the right to a trial by jury was raised by some defendants. The Court held that a jury would not be called except on the question of the amount of damages to which cross-petitioners would be entitled if the ownership was found to be in defendants.

The case was fully tried thereafter to the Court. The Court requested briefs to be accompanied by requested Findings of Fact and Conclusions of Law. Since the trial the Court has been furnished excellent briefs and requests. The first briefs were received in late May, and the last was received from defendant Marvin J. Morse during the week of July 22d. To this brief under the Court's order plaintiffs have a right yet to reply. However, under date of June 26, 1968, plaintiffs advised the Court that plaintiffs

would make no further reply, so it is assumed this last brief of Marvin J. Morse will not be answered.

The Court having found for the plaintiffs is largely adopting the requested Findings of Fact and Conclusions of Law as submitted by plaintiffs with certain amendments and deletions thought either improper or irrelevant.

Findings of Fact

1. This is an action brought to quiet the title to certain real estate situated in Rooks County, Kansas. Plaintiff Charley A. Lynd, is the owner, in possession, of the entire surface estate and an undivided 3/8th interest in the minerals and mineral estate in the following described land:

> All that portion of Section Thirty-two (32), Township Nine (9), Range Nineteen (19), Rooks County, Kansas, lying south of the Union Pacific Railroad right-of-way.

Plaintiff D. A. Hindman, is the owner, in possession, of an undivided 1/4th interest in the minerals and mineral estate in and under the above described land. The defendants are collectively the owners of an undivided 3/8th interest in the minerals and mineral estate in and under the above described land, but claim to be the owners of the entire fee simple interest in said land, which claim is asserted in answers and cross-petitions filed in this action. The original defendants in this action are the eight daughters of George W. Atherton and Hattie Atherton, deceased. During the pendency of this action, one of the daughters, Mary Catherine Shepard, died. By proper proceedings and order of the Court, her surviving children and heirs were substituted and served as parties defendant. This is an action brought to quiet or determine title under the provisions of K.S.A. 60-1002. Proper service has been made on each of the defendants and substituted defendants.

2. At one time, the real estate in question was owned by James E. Atherton, who died testate on July 21, 1925. The will of James E. Atherton was admitted to probate in Rooks County, Kansas. The property in question was devised by paragraph Sixth of the will, which reads:

> "Sixth: I give, devise and bequeath to my son, George W. Atherton, of Sharon Springs, Kansas, to be held by him and for his use during his natural life time, provided he pays the taxes as they become due and payable on the following described land: All that portion of Section Thirty-two (32), Township Nine (9), Range Nineteen (19), Rooks County, Kansas, lying south of the Union Pacific Railroad right-of-way. After the death of my son, the said George W. Atherton, it is my will and I hereby direct that the last above described real estate shall descend to the children of his body and that the same be held by them and for their use for a period of twenty (20) years from the time of the death of the said George W. Atherton, after which time the same children of my son, George W. Atherton, shall come into full possession of the said described real estate and may hold the same or dispose thereof in any manner they wish."

The present defendants are the children and grandchildren of George W. Atherton.

3. George Atherton took possession of the real estate following the death of his father James E. Atherton, and continued in possession of the property until the occurrence of certain events in 1944. For at least 12 years prior to 1944, George Atherton failed to pay the taxes on the property. The George Atherton family was in difficult financial straits in 1944, and for several years before, and the taxes were unpaid because of this condition.

4. In the fall of 1943, the Board of County Commissioners of Rooks County, Kansas, brought an action (Case

No. 7783, styled *Board of County Comm. v. Silvers*) to foreclose its lien for delinquent taxes on this and other tracts of real estate in Rooks County. At that time the delinquent taxes on this property totaled $3,045.59. Proper service was made on George Atherton and his wife Hattie Atherton, and on each of their eight children.

5. Shortly after the commencement of the tax foreclosure action, George Atherton and his wife employed D. A. Hindman, an attorney in Stockton, Kansas, and one of the plaintiffs in this action, to represent them as counsel in the tax foreclosure case. Hindman, with the knowledge and consent of his clients, prepared and filed an answer in the tax foreclosure action admitting that George Atherton was the owner of the property and requesting that if the property be sold at tax foreclosure, any surplus in sale proceeds above the amount of delinquent taxes and costs of the proceeding be paid to George Atherton. In due course, an order was entered in the tax foreclosure proceeding directing that any surplus sale proceeds be paid to George W. Atherton.

6. George Atherton did not have the money to pay the delinquent taxes on the real estate; prior to the foreclosure sale he and his wife undertook to arrange a private sale of the property under circumstances which would preserve some interest in the mineral estate for themselves and their children. The tax foreclosure sale was to be held February 11, 1944. George W. Atherton and his wife Hattie Atherton traveled to Wakeeney to meet with the plaintiff Lynd. The plaintiff Hindman was not present at the meeting. On February 10, the day before the sale, Hattie Atherton called Hindman long distance, and informed him that the Atherto[illegible] and the Lynds had arrived at an agreement by which Lynd would purchase the property and, as consideration for the purchase, would pay

the delinquent taxes and an additional amount of $3,000 to George and Hattie Atherton. It was also agreed that George and Hattie Atherton would retain or receive by conveyance from Lynd, an undivided 3/8ths interest in the oil, gas and other minerals under the property for a period of twenty (20) years from the date of the transaction and as long as there was production on the property. Hattie Atherton requested Hindman to advance the funds necessary to pay the taxes and redeem the property before sale because it appeared likely that weather conditions would prevent the Lynds and Athertons from making the trip from Wakeeney to Stockton by the time of the sale. Hindman followed the instructions of his clients and on the following day, February 10, 1944, advanced the funds necessary to pay the delinquent taxes and caused the redemption of the property to be entered in the name of George W. Atherton.

7. The Lynds and the Athertons went to Stockton and met with the plaintiff Hindman to arrange for closing of the sale transaction. Lynd reimbursed Hindman for the funds advanced in payment of the delinquent taxes. A special warranty deed was prepared, executed and delivered by George W. Atherton and Hattie Atherton, transferring title to the real estate in question to the plaintiff Lynd. Hindman advised the parties that because of the terms of the will of James E. Atherton and doubts or legal questions as to the character of the estate created by the Sixth paragraph of the will which passed title to this property, it would be necessary to commence and successfully conclude a quiet title action in order to vest in the purchasers a merchantable title. During this meeting, a contract of employment between Lynd and his wife and Hindman was prepared and executed, providing, in substance, that Hindman would be entitled to receive for his services in connection with the title action an undivided

1/4th interest in the oil, gas and mineral rights in the land for a period of twenty (20) years and as long as oil or gas is produced from the property if he were successful in clearing the title to the property. During the meeting the plaintiff Lynd requested George and Hattie Atherton to contact their eight daughters and explain the transaction to them in order to be certain that there would be no misunderstandings or hard feelings in the family.

8. The plaintiff Hindman prepared and filed the papers necessary to commence an action to quiet the title. (Case No. 7807, styled *Lynd* v. *Hillman*, in the District Court of Rooks County, Kansas) The eight daughters of George and Hattie Atherton, along with other parties, were named and joined as defendants. The records on file with the Clerk of this Court in Case No. 7807 (of which the Court takes judicial notice with the consent and stipulation of the parties) reflect that each of the eight children of George W. Atherton and Hattie Atherton were duly and properly served or summoned in the quiet title suit in the manner provided by law. In addition to service by publication on the defendants residing outside the state of Kansas, plaintiff Hindman mailed by registered mail copies of the publication notice to all such defendants, and receipts with signatures of these defendants appearing thereon were returned and filed in Case No. 7807. During the pendency of the quiet title suit, George and Hattie Atherton contacted each of their daughters to inform them of the transaction with Lynd and the pending quiet title suit. On February 16, 1944, Hattie Atherton wrote plaintiff Lynd, as follows:

> "We have seen and heard from five of the children and I have written the other three everything is perfectly satisfactory with them and they will do all they can to help clear the title for you either by ignoring the notice the sheriff serves on them and if it is neces-

> sary later for them to sign the deed, they will do that. All they want is for the agreement between you, Elida (Lynd), George and I put into writing giving George and I and our heirs 3/8th of the oil and gas rights or mineral rights for twenty years or as long after as the land produces." (Plaintiffs' Exh. 5.)

On April 7, 1944, Hindman, acting on the instruction of his clients, prepared the agreement requested in Hattie Atherton's letter to Lynd. This contract was signed by George Atherton and his wife, and Lynd and his wife. It provided, in substance that the Lynds would convey to the Athertons 3/8th interest in the oil, gas and mineral rights for a period of twenty (20) years and as long as oil or gas is produced from the premises, immediately after completion of the quiet title proceeding.

9. The Court finds that each of the eight daughters of George and Hattie Atherton (including Mary Catherine Shepard, deceased) had actual knowledge of the transaction entered into by their parents with the plaintiff Lynd. They also knew that as a part of that transaction a quiet title suit was commenced and prosecuted in which they were joined and summoned as defendants. The Court also finds that the eight daughters failed to appear and plead or assert any title to the property in the quiet title action and that they did so knowingly and intentionally. None of the defendants acted upon any advice or statement of the plaintiffs. None of the eight children were under any disability which would have prevented them from asserting any claims or rights which they might have had or believed they had at the time of the quiet title suit. The defendants and cross-petitioners in this action have failed to sustain the burden of showing that they were misled, defrauded or overreached by anyone in connection with their failure to appear and litigate the 1944 quiet title action.

10. The evidence is clear and uncontroverted, and the Court finds, that all communications with the eight daughters of George and Hattie Atherton which took place during the transaction with Lynd and the commencement and prosecution of the quiet title action, were communications between the children and their parents. Neither Hindman nor Lynd had any communications or made any representations to the children of George and Hattie Atherton concerning the Lynd transaction or the quiet title suit. There is no creditable evidence adduced by the defendants and cross-petitioners in this action tending to establish that George Atherton or Hattie Atherton were acting as the agents or as conspirators with either of the plaintiffs in connection with any statements made by the parents to their children concerning the Lynd transaction or the quiet title suit. The evidence adduced by all of the parties convinces the Court that Lynd and Hindman were at all times acting in good faith. The Court also believes that at the time of the tax foreclosure, the transaction with Lynd and the quiet title action, George Atherton and his wife were acting in good faith and pursued the course which they believed to be the most reasonable and best one available to them to salvage some interest in the land for themselves and for their children.

11. On April 12, 1944, judgment was entered in the quiet title action (Case No. 7807) quieting title to the fee simple interest in the real estate in the plaintiff Lynd, and declaring the defendants in that action to have no right, title or interest in the property. No appeal was taken from that judgment. At the time of the trial and final hearing in that action, the Lynds and Athertons were present in the courtroom. There was no misstatement or misrepresentation by anyone present concerning the interest, position or failure to appear and plead, of the children of George and Hattie Atherton. The plaintiff Lynd entered

into possession of the property and has remained in possession and has paid taxes on the surface and 3/8th of the mineral estate since that date. The plaintiff Hindman entered into possession of an undivided 1/4th interest in the mineral estate.

12. On or about June 15, 1944, the Lynds and the Athertons concluded the transaction between them. Lynd paid George Atherton the sum of $3,000, the balance of the purchase price of the property. Lynd and his wife executed royalty or mineral deeds to George W. Atherton and his wife, and to plaintiff Hindman, which conformed to and carried out the terms of the written agreements between them.

13. At various times since 1944, the plaintiffs and their wives and George and Hattie Atherton joined in the execution of oil and gas leases covering all or parts of the property in question. Oil production was first discovered on the property in 1951, but these wells were subsequently plugged and abandoned. In 1960 production was again discovered, and there are several producing wells on the property at the present time.

14. When George and Hattie Atherton received the payment of $3,000 from the plaintiff Lynd, in the summer of 1944, they paid to each of their daughters the sum of $100. The children knew and understood that this money was a part of the consideration received by their parents in the Lynd transaction. When oil was discovered and first produced from the property in 1951, George and Hattie Atherton distributed portions of the royalties received by them to their eight daughters, who accepted and retained these payments with knowledge of the source from which they came. George Atherton died in 1961, and Hattie Atherton died in 1963. Following the death of their parents, the eight daughters of George and Hattie Atherton

succeeded to the 3/8ths mineral and royalty interest acquired by their parents in the Lynd transaction. Since the probate of their parents' estates, they have been paid, and have accepted and retained, their proportionate share of the oil and gas royalties accruing to the 3/8th royalty interest owned by their parents. The defendants executed division orders with the purchasers of crude oil from the premises under which they were paid their respective shares of the 3/8th royalty interest owned by their parents.

15. The defendants failed to take any action or commence any legal proceedings to assert any right, title or interest in the property or set aside the judgment in Case No. 7807 for more than twenty (20) years after the Lynd transaction and the entry of judgment in Case No. 7807. On March 25, 1960, the defendant Margaret Christensen (then Margaret Jewkes) executed and delivered a Quit Claim Deed to the property in question in which her father George W. Atherton was named as the grantee.

Conclusions of Law

1. The Court has jurisdiction of the parties and this action.

2. The defendants and cross-petitioners have failed to sustain the burden of proof to show that they were defrauded or in any way unlawfully deprived of an interest or expected interest in the real estate involved in this action.

3. The claims of the defendants and cross-petitioners, insofar as they seek to recover any title or estate in the property greater than the 3/8th mineral and royalty estate presently vested in them by inheritance from their parents, or insofar as they seek to claim any title adverse to the present title and estate of the plaintiffs, have been barred by laches, adverse possession and the statutes of

limitation, and specifically, by the provisions of K.S.A. 60-260, 60-507 and 60-513.

4. The defendants' claims in this action, and their cross-petitions, amount to an improper collateral attack upon the judgment of this Court in Case No. 7807, *Lynd* v. *Hillman, et al.*

5. The judgment in Case No. 7807 is res judicata and conclusive of the defendants' claims asserted and litigated in this action.

6. The defendants' cross-petitions are denied and plaintiffs are entitled to judgment against the defendants and each of them for the relief sought in their petition. Counsel for plaintiffs will prepare and submit an appropriate Journal Entry of Judgment.

Dated this ..... day of August, 1968.

/s/ C. G. Birney
District Judge